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No. - .

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Is this case moot in light of *Firefighters Local Union No. 1784* v. *Stotts*, ____ U.S. ____, 104 S.Ct. 2576 (1984) and other precedent of this Court?

Parties.

The caption at 1a, 2a identifies all parties to the proceedings in the Court of Appeals for the First Circuit whose judgment is sought to be reviewed. They are the same parties to the initial proceedings in this Court in Nos. 82-185, 82-246, and 82-259. Boston Firefighters Union, Local 718 and Boston Police Patrolmen's Association, Inc., were petitioners in Nos. 83-866 and 83-885 respectively.

The city of Boston and its Fire Commissioner were parties in the District Court proceeding but took no appeals.

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No. - .

In the

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OCTOBER TERM, 1984.

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PETITIONER,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Boston Firefighters Union petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit, requesting this Court to review the First Circuit's judgment in *Boston Chapter, N.A.A.C.P.* v. *Beecher*, Nos. 81-1642, 81-1650, 81-1651 and 81-1656 (1st Cir. December 7, 1984).

Opinions Below.

The consolidated opinion on remand of the United States Court of Appeals for the First Circuit is reproduced at pages 1a-5a of the Appendix hereto and is not reported.

The opinion on remand follows this Court's *per curiam* order in Nos. 83-866 and 83-885, 104 S.Ct. 3576 (1984). Other relevant opinions below are reported at 716 F.2d 931 (1st Cir. 1983), at 679 F.2d 965 (1st Cir. 1982) ("*Beecher II*") and at 522 F.Supp. 873 (D. Mass. 1981).

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on December 7, 1984. This petition is being filed within ninety (90) days of that date and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision Involved.

The Constitutional provision is U.S. Const. Art. III, § 2, cl. 1 which is reproduced at page 6a.

Statutes mentioned *passim* are 1982 Mass. Acts, c. 190, § 25 and Mass. Gen. Laws. c. 31, § 39, which are reproduced at pages 6a-8a.

Statement of the Case.

This petition seeks a writ of certiorari on the basis of this case's identity with *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. , 104 S.Ct. 2576 (1984) and because of persisting consequences of the August 7, 1981 orders of the district court that continue to impact upon parties having adverse legal interests.

A. *Relevant Prior Proceedings.*

An August 7, 1981 order of the district court enjoined layoffs of Boston firefighters in any manner that would reduce the percentage of minority members below a percentage stated in the order. 522 F.Supp. 873 (D. Mass. 1981). Senior non-minority firefighters entitled by length of service (seniority) to retain their jobs were terminated. The Court of Appeals affirmed. 679 F.2d 965 (1st Cir. 1982). This Court granted certiorari on November 1, 1982, 459 U.S. 967, 103 S.Ct. 293 (1982) and, after argument, vacated the judgment of the First Circuit and remanded for consideration of mootness in light of 1982 Mass. Acts, c. 190, § 25.[1]

The First Circuit entered judgment on August 31, 1983 on the basis that the state enactment vitiated the necessary "personal stake" of the minority firefighter movants, rendering the cases moot. 716 F.2d 931 (1st Cir. 1983) (*Beecher II*).

Boston Firefighters Union, Local 718 and Boston Police Patrolmen's Association again petitioned for certiorari review of the First Circuit's judgment. Nos. 83-866 and 83-885. This Court granted the petitions *per curiam* and remanded for further

[1] 1982 Mass. Acts, c. 190, § 25, the "Tregor Act" provided for the reinstallment of all laid-off firefighters, protected such reinstated personnel against any future separation from active service for lack of funds, and required minimum staffing levels through June 30, 1983.

consideration in light of *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. ____, 104 S.Ct. 2576 (1984).

Upon this remand, the First Circuit affirmed its August 31, 1983 judgment vacating the August 7, 1981 order citing four (4) reasons. No senior firefighter or officer sustained a persisting competitive seniority disadvantage (which petitioner Local 718 concedes). The district court order had already been ordered vacated by the First Circuit and there was no longer any controversy about the merits because the respondent here stipulated that if the First Circuit readied the merits, it should enter a judgment summarily reversing the merits. Significantly, the First Circuit also noted:

> the layoffs here, like those in *Stotts*, have created a back pay controversy. But as we explained in *Beecher II*, this federal appeal is only indirectly related to that controversy, which is currently the subject of state proceedings. Unlike *Stotts*, an important party to that controversy, the City, is not a real party before us. Since no party before us has any financial stake in denying the laid off employees back pay, it is difficult to see how this matter can create a controversy between them.

(See Appendix at 4a.)

B. *The Back Pay Controversy.*

The layoffs here have lengthy histories, with which this Court is familiar. *See*, Brief on the Merits for Local 718, at 9-10, Nos. 82-185, 82-246, 82-259 and Petition of Local 718 for Writ of Certiorari, at 5, 6, No. 83-866.

All firefighters terminated during Boston's layoff program filed appeals to the Massachusetts Civil Service Commission (CSC). Although all available personnel were rehired under the mandate of the Tregor Act, they sustained salary losses now the subject of their ongoing CSC appeals in which they are

represented by Local 718. Firefighter CSC appellants and the city of Boston have engaged in extensive evidentiary hearings and conferences before a CSC hearing officer on fiscal, safety and work load, seniority, and procedural issues. Some senior firefighters represented by the union urge that their terminations violate the seniority terms of the Massachusetts Civil Service statute, Mass. G.L. c. 31, § 39. The city of Boston defends against their seniority-based claims on the basis that the district court order extinguished those seniority rights. CSC accepted initially its hearing officer's report and affirmed the layoffs. The report agreed with the city of Boston that it had acted properly by following a valid federal court order in determining individual firefighters' terminations.

CSC, however, on firefighters appellants' motion for reconsideration and to reopen record, reopened the appeals. One ground urged by appellant firefighters is that the hearing officer had misapplied federal law. The salary claims continue to be pursued and opposed vigorously by appellant firefighters and the city of Boston.

Reasons For Granting the Writ.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH STOTTS AND WITH OTHER APPLICABLE DECISIONS OF THIS COURT.

Potential back pay claims conserved *Stotts* from mootness despite restoration of laid-off and demoted Memphis personnel to their former positions. In *Stotts*, the potential back pay claims were only indirectly related to the federal litigation and not pending in it. Nevertheless, the influence of the federal judgment on the disposition of the back pay claims maintained a live controversy: ". . . if the Court of Appeals' judgment is reversed, the City would be free to take a wholly different posi-

tion with respect to backpay. . ." 104 S.Ct. at 2584. A sufficient concrete interest in the outcome still existed and foreclosed mootness. Boston senior firefighters' CSC appeals are active and actual. CSC is confronted with a city of Boston defense that seniority rights were modified by a (then) valid order. Reversal of the August 7, 1981 order expands the options of CSC in dealing with that city defense. To put the matter almost in this court's words, ". . . if the Court of Appeals judgment is reversed, [the Massachusetts CSC] would be free to take a wholly different position with respect to back pay." *Id.*

The First Circuit concludes that the city of Boston is not a real party before that Court (App. 4). However, the city of Boston is a party to the litigation and it has a financial stake in denying the laid-off employees back pay. While city inactivity in any appeals from the district court's August 7, 1981 order enhances tactical advantages in its back pay defenses, its inactivity does not subvert the fact that parties to the litigation still have an interest in the disposition of the original order. The First Circuit recognized that a merits determination "might facilitate the Civil Service Commission's resolution of the back pay claims" 716 F.2d at 933.

A "case or controversy" persists when a party can demonstrate that a judgment creates consequences impairing his present interests which can be corrected upon review. *Sibron* v. *New York*, 392 U.S. 40, 54-56 (1968). Such collateral consequences and their correction are enough for Article III's purposes. *Id.* at 54-56; *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968).

Although the district court's order was ordered to be vacated (*Beecher II*), 716 F.2d at 933, the presumption of validity during its term is the disability that persists to the detriment of senior firefighters. As already suggested, *supra*, validity or invalidity can be decisive on the outcome of the senior firefighters' appeals.

Quite apart from its perceived distinction between the back pay claim in *Stotts* and the back pay claims here, the First Circuit points to respondent's tactical stipulation of summary reversal if the Court of Appeals should reach the merits. In light of *Stotts*, the proffer of that stipulation is not surprising. The First Circuit failed to take into account the comment in *Stotts*, 104 S.Ct. at 2585:

> Respondents cannot invoke the jurisdiction of a federal court to obtain a favorable modification of a consent decree and then insulate that ruling from appellate review by claiming that they are no longer interested in the matter, particularly when the modification continues to have adverse effects on the other parties to the action.[6] (Footnote omitted).

Conclusion.

The Writ should issue and this Court, pursuant to Supreme Court Rule 23.1, should enter a summary order reversing the judgment of the Court of Appeals and summarily reversing the district court's August 7, 1981 order and dismissing the motions for modification on the merits.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 81-1642

BOSTON CHAPTER, NAACP, ET AL.,
Plaintiffs, Appellees,

v.

NANCY B. BEECHER, ET AL.,
Defendants, Appellees.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Intervenor, Appellant.

No. 81-1650

PEDRO CASTRO, ET AL.,
Plaintiffs, Appellees,

v.

NANCY BEECHER, ET AL.,
Defendants, Appellees.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Intervenor, Appellant.

No. 81-1651

PEDRO CASTRO, ET AL.,
Plaintiffs, Appellees,

v.

NANCY BEECHER, ET AL.,
Defendants, Appellants.

No. 81-1656

BOSTON CHAPTER, NAACP, ET AL.,
Plaintiffs, Appellees,

v.

NANCY B. BEECHER, ET AL.,
Defendants, Appellees.

CIVIL SERVICE COMMISSION, ET AL.,
Defendants, Appellants.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before
Campbell, *Chief Judge*,
Bownes and Breyer, *Circuit Judges*.

December 7, 1984

Per Curiam. In *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d 965 (1st Cir. 1982) ("*Beecher I*"), this court affirmed a district court order modifying Boston police and fire department seniority rules, so as to prevent the departments from laying off too many minority officers. The parties sought Supreme Court review. The Supreme Court remanded the case to us for reconsideration in light of a later-enacted state law, the Tregor Act, 1982 Mass. Acts ch. 190, § 25, which removed the imminent threat of layoffs, reinstated all officers laid off, and provided them with retroactive competitive seniority. Upon reconsideration, we found that the Tregor Act ended the controversy between the parties and rendered the case moot. We ordered the district court's injunction vacated. *Boston Chapter, NAACP* v. *Beecher*, 716 F.2d 931 (1st Cir. 1983) ("*Beecher II*"). The parties again sought Supreme Court review.

While the petition for certiorari in *Beecher II* was pending, the Supreme Court decided a factually similar case, *Firefighters Local Union No. 1784* v. *Stotts*, 52 U.S.L.W. 4767 (U.S. June 12, 1984). In *Stotts*, the Supreme Court examined a "seniority/racial minority layoff" problem much like the one at issue in *Beecher II*. It ruled that a state law similar to the Tregor Act did not render the controversy moot; and on the merits, it held a similar district court injunction unlawful. The Supreme Court has now remanded the case to us again and asked us to reexamine our "mootness" holding in light of *Stotts*. *Boston Firefighters Local 718* v. *Boston Chapter, NAACP*, 52 U.S.L.W. 3934 (U.S. July 5, 1984).

Having reconsidered the case before us, we find that it differs from *Stotts*, in respect to mootness, in several important ways. First, the Tregor-like state law in *Stotts* did not provide retroactive competitive seniority for those who had been laid off. The parties in that case disagreed about seniority and believed the lawfulness of the district court's injunction deter-

minative. Here, the parties agree that there is no seniority problem or issue.

Second, the layoffs here, like those in *Stotts*, have created a back pay controversy. But, as we explained in *Beecher II*, this federal appeal is only indirectly related to that controversy, which is currently the subject of state proceedings. Unlike *Stotts*, an important party to that controversy, the City, is not a real party before us. Since no party before us has any financial stake in denying the laid-off employees back pay, it is difficult to see how this matter can create a controversy between them.

Third, the Supreme Court in *Stotts* specifically noted that the district court injunction "was affirmed by the Court of Appeals and has never been vacated." 52 U.S.L.W. at 4769. Here, to the contrary, we have already ordered the district court order vacated, 716 F.2d at 933; *see United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). To accept appellants' argument would mean resurrecting a dead order solely for the purpose of then striking it down on the merits.

Fourth, there is no longer any controversy about the merits. The NAACP has stipulated that, should we reach the merits, we should enter a

> judgment summarily reversing the district court's August 7, 1981 orders and remanding with instructions to dismiss the motions for modification with prejudice.

In *Stotts*, by contrast, the parties vigorously disputed the underlying merits — a dispute fueled by their adverse interests on the competitive seniority issue.

At oral argument, the NAACP's counsel stated that he was arguing for "mootness" because he believed it the legally correct approach, not because it made a significant difference to his clients. We agree with counsel. The four sets of considerations we have mentioned, viewed in light of Article III's con-

stitutional limitation of this court's power to actual "cases" or "controversies," persuade us that a dismissal on grounds of mootness is legally correct. We therefore reaffirm *Beecher II*, which vacated the district court's August 7, 1981 orders on those grounds.

UNITED STATES CONSTITUTION.

Article III, § 2, Cl. 1.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

MASSACHUSETTS ACTS OF 1982.

Chapter 190.

AN ACT ESTABLISHING THE CITY OF BOSTON FUNDING LOAN ACT OF NINETEEN HUNDRED AND EIGHTY-TWO AND THE MASSACHUSETTS CONVENTION CENTER AUTHORITY.

SECTION 25. Notwithstanding the provisions of any general or special law to the contrary, the appointing authority of the police department and the fire department of the City of Boston shall reinstate to active service as of the effective date of this act any uniformed officer of either department who was in service or on injured leave as of July first, nineteen hundred and eighty-one, or was temporarily suspended as of July first, nineteen hundred and eighty-one, which suspension has ex-

pired, except for disciplinary reasons consistent with chapter thirty-one of the General Laws or in pursuit of an involuntary retirement under section seven of chapter thirty-two of the General Laws and shall not thereafter terminate any such officer or take any other personnel action the effect of which would be to separate such officer from active service in the future for lack of funds. During the fiscal years ending June thirtieth, nineteen hundred and eighty-two and June thirtieth, nineteen hundred and eighty-three the City of Boston shall maintain in the police department and the fire department of the City of Boston, either in active service, training or recruitment, no fewer uniformed employees than the total of the number in service or on injured leave on March twenty-fourth, nineteen hundred and eighty-two plus the number of uniformed employees eligible for reinstatement pursuant to this section, without regard to the number of eligible uniformed employees who actually return to service in either department. Nothing herein shall prevent an employee of either department from being placed in [*sic*] injured leave under the provisions of section one hundred and eleven F of chapter forty-one of the General Laws. The mayor shall annually request and the city council shall annually appropriate sufficient amounts to the respective departments to cover the costs imposed by this section, but nothing in this section shall be construed to permit the officers in charge of said departments to expend funds in excess of available appropriations in violation of the city charter.

MASSACHUSETTS GENERAL LAWS (Ter. Ed.)

Chapter 31, Section 39.

If permanent employees in positions having the same title in a departmental unit are to be separated from such positions

because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.